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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RESEARCH TRIANGLE INSTITUTE,
Petitioner,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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In their Brief in Opposition to the Petition for Certiorari, Respondents argue that the decision of the court below did not conflict with a) decisions of this Court, or b) decisions of any court of appeals. In each instance, their Brief fails to prove the point; and instead it is clear that these conflicts exist which the Court should review.

I.

Petitioner is seeking to recover the extra costs it incurred under its contract with respondent Board because of major changes the Board made in the contract specifications while it was being performed. This contract was for the performance of a survey for the benefit of the twelve Federal Reserve Banks, which are regulated by the Board. Had the contract been with a Federal Reserve Bank, instead of with the Board, a District Court would clearly have jurisdiction because Congress has specifically authorized the Reserve Banks to "sue and be sued."[1] When the relationship between the Board and the Reserve Banks is considered in context, the circumstance that the Board was the nominal contracting party did not preclude the District Court from having jurisdiction over the suit.

Petitioner's brief cited three cases which held that when an entity created by Congress enters into "commercial" contracts, a waiver of sovereign immunity should be construed liberally. *See Federal Deposit Insurance Company v. Meyer*, 510 U.S. 471 (1994); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Federal Housing Authority v. Burr*, 309 U.S. 242 (1944). The respondent Board seeks to distinguish those cases because they involved "sue and be sued" clauses. However, the opinions in those cases do not purport to limit the applicability of their governing principles to only those waivers manifested by a "sue and be sued" clause in a governing statute. Their language is broader. For example, *Burr* cites *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939) for the "premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed." 309 U.S. at

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[1] *See* 12 U.S.C. § 341.

245. Moreover, in *Burr* the suit was successfully maintained against the "Federal Housing Administration," even though the power to "sue and be sued" had been granted by Congress to the "Federal Housing Administrator."

As pointed out in the petition for certiorari, there are several statutory provisions which, when "liberally construed," mandate the conclusion that any sovereign immunity of the respondent Board has been waived as to Petitioner's claim. The Board provides for its anticipated expenses by semi-annual assessments against the Federal Reserve Banks. (Pet. 4.) These Banks, whose operating funds are non-appropriated, have been authorized to "sue and be sued."[2] Thus, a waiver of sovereign immunity has taken place as to the funds held by these Reserve Banks -- the funds from which Congress contemplated that the respondent Board would obtain its financial support.[3] Petitioner submits that, when "liberally construed," the waiver of sovereign immunity as to the principal source of funds for the Board of Governors was the functional equivalent of waiving any sovereign immunity of the Board itself with respect to the "commercial" contract on which Petitioner has brought suit.[4] This result flows naturally from applying the principle that the various

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[2] *See id.*

[3] However, as noted later in this Memorandum, Congress did not preclude the appropriation of funds for the Board if this was determined to be necessary or desirable.

[4] Although the saying "show me the money" is not a legal principle, it helps focus on the underlying fact tha: Congress did clearly waive sovereign immunity with respect to funds obtained from fees charged by Federal Reserve Banks to member banks of the Federal Reserve System created by Congress. When those funds have once been placed at risk by that waiver, the doctrine of sovereign immunity should not thereafter be applied to them.

statutory provisions applicable to the Federal Reserve System be taken as a whole and construed together in light of their underlying principles. For example, Congress has clarified the powers of the Board of Governors (codified at 12 U.S.C. § 248) by adding subsection (p), which clearly contemplates suits by and against the Board and which states: "The Board may act in its own name and through its own attorneys ... in any action, suit, or proceeding to which the Board is a party and which involves," *inter alia*, "the administration of its operations."[5] The Conference Report on this legislation, which makes clear that the term "administration of its operations" was intended to include "personnel and contract disputes," reveals unmistakably that Congress assumed that the Board could be a party to litigation and believed that sovereign immunity had been waived with respect to contracts such as that entered by the Board with Petitioner RTI.[6]

Respondents cite *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, __ U.S. __, 118 S. Ct. 1700 (1998). However, the Opinion of the Court in that case by its own admission perpetuated an anachronism and involved tribal sovereign immunity, which is like the immunity of a foreign sovereign and provides no guidance for the present case. Respondents dispute the applicability of *United States*

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[5] Pub. L. No. 103-325, Title III, § 331(d), 108 Stat. 2160, 2232 (Sept. 23, 1994) (codified at 12 U.S.C. § 248(p)).

[6] The Conference Report submitted prior to passage of that act explained, "[T]he authority granted with respect to 'the administration of its operations' should be construed to include only *its internal regulatory operations, such as personnel and contract disputes*, and not to include administrative matters unrelated to bank regulatory activities, such as Freedom of Information Act requests for monetary policy information." House Conf. Rep. No. 103-652, reprinted in U.S.C.C.A.N., p. 1977 at 2008 (1994) (emphasis added).

v. Winstar Corp., 518 U.S. 839 (1996); but even though that case involved the doctrine of "sovereign act," rather than "sovereign immunity," its result and the principles stated there in the plurality opinion are inconsistent with the narrow interpretation of waiver adopted by the court below and advocated by the respondents.

The Court should grant review to settle the conflict between older precedents espousing strict construction of waiver of sovereign immunity and the more current decisions which "liberally construe" waiver of sovereign immunity when the United States, its "executive agencies,"[7] and its "independent establishments"[8] enter into business-type transactions. Thereby guidance will be provided both for the lower courts and for persons in the private sector as to whether good faith and fair dealing may be assumed in dealing with government entities.

II.

Consistent with its understanding of the purposes of the Tucker Act, 28 U.S.C. § 1491 (1994), the United States Court of Federal Claims -- and previously the United States Court of Claims -- has held the United States liable for contracts entered by a government-related entity for which sovereign immunity had not been expressly waived. *See McDonald's Corp. v. United States*, 926 F.2d 1126 (Fed. Cir. 1991); *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211 (Ct. Cl. 1982). The respondents seek to distinguish those cases, but they are in conflict with the case at hand.

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[7] *See* 41 U.S.C. § 601.

[8] *See* 5 U.S.C. § 104.

In *McDonald's*, the contract was entered by NAVRESSO, an organization which acted for the benefit of Navy Exchanges -- military-related entities as to which the Tucker Act, as amended, has specifically waived liability. *See McDonald's*, 926 F.2d at 1129. Respondents maintain that NAVRESSO, which was a "'central management office' for the Navy resale system" and was "the functional equivalent of the purchasing arm of the Naval Exchanges" should be distinguished from the Federal Reserve Board, which regulates the Reserve Banks. However, the contract which the Board entered with Petitioner was a purchase of the services and skills of Petitioner and its employees to conduct a survey for the benefit of the Federal Reserve Banks. Indeed, the Board centrally determined what were the needs of the Reserve Banks with respect to the survey and managed the performance of the survey. Although Respondents claim that the Board and the Reserve Banks are "expressly independent statutory entities," they are all part of the single integrated Federal Reserve System, and the statutory provisions as to that system should be construed *in pari materia*. Moreover, the Board clearly is not "independent" of the Reserve Banks insofar as its operating funds are concerned, because these funds are obtained from the Banks by periodic assessments.

Respondents suggest that the Comptroller of the Currency in *L'Enfant Plaza* can be differentiated from the Board in this case. However, like the Board, the Comptroller's expenses are paid regularly from assessments against the banks over whose activities his or her office has oversight. Moreover, just as is true for the Comptroller, no statutory authorization for expenditure of funds precludes the use of appropriated funds to defray expenses of the Board if the funds levied against the Reserve Banks prove to be insufficient for this purpose. In this regard the situation is quite different from

that in *McCloskey v. United States*, 530 F.2d 374, 377 (Ct. Cl. 1976) -- distinguished by the Court of Claims in *L'Enfant Plaza* -- and involving a statute which specifically prohibited the use of appropriated funds for the benefit of the entity that had entered the contract.[9] In short, *McDonald's* and *L'Enfant Plaza* apply and rely on principles of fair dealing, which are expected in transactions with the United States government or its agencies. The court below, on the other hand, applies sovereign immunity in a manner which violates those principles. It is important that the conflict be resolved.

Respondents conclude their argument by stating that "the reasoning of *L'Enfant Plaza Properties* could at most justify an assertion of jurisdiction only by the Court of Federal Claims in a case brought under the Tucker Act, not by a district court in a case brought under 28 U.S.C. 1331." (Resp. 9-10.) This comment ignores the effect of 28 U.S.C. § 1631, which authorizes transfer of jurisdiction from one

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[9] *See* 2 D.C. Code § 1727 ("Nothing contained in this subchapter shall be construed to authorize or permit the Board or any member thereof to create any obligation or incur any liability other than such obligations and liabilities as are dischargeable solely from funds contemplated to be provided by this subchapter"). The absence of such an express limitation in any statute pertinent to the Board leads to the same conclusion reached in *L'Enfant*.

federal court to another, rather than dismissal, if the former court lacks jurisdiction.[10]

In its brief in the court of appeals, Petitioner pointed out that if that court decided that the district court lacked jurisdiction to entertain the suit against the Reserve Board, it should order the case transferred to the Court of Federal Claims.[11] The same point was made there during oral argument. Under the Tucker Act, the Court of Federal Claims has concurrent jurisdiction with the district courts over contract disputes for monetary damages not exceeding $10,000, *see* 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over suits in which monetary damages exceed $10,000, unless there is an independent waiver of sovereign

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[10] Section 1631 provides in pertinent part:

> "Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court *shall, if it is in the interest of justice*, transfer such action ... to any other such court in which the action . . . could have been brought at the time it was filed . . ., and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred" (emphasis added).

28 U.S.C. § 1631. *Cf.* 28 U.S.C. § 1292(d)(4), concerning appeal of an order transferring a case to the Court of Federal Claims. *See also* 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4101 (2d ed. 1988) ("the Act [creating the Claims Court] authorized any federal Court in which a civil case is filed improperly to transfer the case to a Court in which jurisdiction is proper").

[11] "If the Court concludes that the Board was properly dismissed as a defendant but the United States was not, the case should be transferred to the Court of Federal Claims." (App. Br. 8 n.1.)

immunity as to that claim.[12] Thus, if Petitioner's monetary claim were only for $10,000, the district court would have had jurisdiction over this action. Although a district court lacks jurisdiction under the Tucker Act over suits for more than $10,000, the court "shall" consider transferring the action to the Court of Federal Claims if "in the interest of justice." This language is mandatory and creates a duty in the district court to consider transfer. The court errs if it fails to give that consideration. *See Town of No. Bonneville, Wash. v. U.S. District Court*, 732 F.2d 747, 751 (9th Cir. 1984) ("The District Court erred in dismissing any claims for money damages over which the Court of Claims has jurisdiction without first considering the propriety of transferring them ... to the Claims Court"). Therefore the courts below erred by failing to consider whether it would be "in the interest of justice" to transfer the case to the Court of Federal Claims.

Certainly if the respondent Board is immune from suit and if the United States is liable to Petitioner under the Tucker Act, it is "in the interest of justice" for this case to be transferred to the Court of Federal Claims, rather than to dismiss it.[13] Indeed, any other result would be a clear injustice -- especially since the respondent Board's General Counsel, when informing Petitioner that its administrative remedies had been exhausted, specifically stated, "[i]f you

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[12] The jurisdiction of the Court of Federal Claims "'is 'exclusive' only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court.'" *Taydus v. Cisneros*, 902 F. Supp. 278, 287 (D. Mass. 1995) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 910, 108 S. Ct. 2722, 2740 (1988)).

[13] In that event, the case should be remanded to the district court to enter an order of transfer to the Court of Federal Claims pursuant to 28 U.S.C. § 1631.

wish to pursue your claim, you may file a complaint with the appropriate *federal district court*" (Pet. 5.) (emphasis added).

CONCLUSION

The lower court's opinion conflicts with governing precedents from this Court and with persuasive precedents from other courts of appeal. It is important that this conflict be resolved, and the current confusion removed.[14] Therefore, review should be granted.

Respectfully submitted,

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[14] A prime example of the confusion – and resulting reluctance to deal with government entities – is that the Chief Counsel of the Federal Reserve Board wrote to Petitioner that "you may file a complaint with the appropriate federal district court," but then once the complaint had been filed, the Board asserted sovereign immunity with respect to that complaint.